The obvious similarity between the sleeping-car and the day coach has doubtless been a factor in determining the result the cases have reached. The railroad is liable for property lost in its day coaches only if it has been negligent. The reason seems to be that the luggage is never entrusted to the carrier's possession. *Tower* v. *Utica, etc., R. R. Co.*, 7 Hill (N. Y.) 47. With the introduction of sleeping-cars the railroad was held to the same but to no greater degree of responsibility for property lost in them, and it was not allowed to shift its responsibility when the sleepers were operated by a special company. *Kinsley* v. *Lake Shore, etc., R. R. Co.*, 125 Mass. 54. The courts have naturally been disinclined to impose a stricter rule of liability upon the sleeping-car company than upon the railroad. A potent factor, however, in the development of these rules is doubtless to be found in the disfavor with which the modern law looks upon absolute liability.

DEATH IN A COMMON DISASTER. — The rule has been repeatedly laid down that in cases of death by a common disaster no presumption of survivorship exists, and that in the absence of evidence he who has the burden of proving survivorship must fail, because he cannot make out his case. *Wing* v. *Angrave*, 8 H. L. Cas. 183. The question generally arises when a common disaster befalls devisor and devisee, testator and legatee, or insured and beneficiary under a life insurance policy. It is remarkable that apparently no decided case squarely raises the question whose heir takes the estate when a devisor and his devisee perish together. The early English cases were all confined to personal property; *Wing* v. *Angrave*, *supra*, was restricted to that by the court. The only American decision involving realty was concerning land already held in trust, so that the legal title did not pass in any event. *Newell* v. *Nichols*, 75 N. Y. 78. At first sight it seems that there would be an absolute dead-lock between the heir of the devisor and the heir of the devisee, neither being in possession. The one cannot prove that the devise lapsed; the other cannot show that his ancestor took as devisee. In this dilemma it may be suggested that the land should escheat. But such an undesirable result is not necessary. The difficulty is purely one of evidence — on whom is the burden of going forward with proof — and a close examination of the situation shows that the devisor's heir can make out a *prima facie* case, whereas the devisee's heir cannot. The former need show only that he is heir of a man who died possessing land; the latter must prove a will and show that there was a devisee who was capable of taking. Obviously the burden of bringing forward evidence is on the devisee's heir and consequently he must lose.

In cases of personalty, where the title vests at once in the executor or administrator, the controversy is as to who can force him to convey. Here the next of kin of the deceased legatee cannot show that such legatee ever acquired a vested interest; nor can the residuary legatee show that the legacy lapsed. Thus neither can prevail against the executor, who, therefore, continues to hold the property. But as he cannot hold for himself, a constructive trust arises in favor of the testator's estate, or next of kin. In reaching this conclusion some authorities have held that by a necessary rule of construction the next of kin are favored. See 14 HARV. L. REV. 538. Others state the rule that "for purposes of distribution" both the decedents must be assumed to have perished at the same moment. *Goods*

of Selwyn, 3 Hagg. Ecc. 748; *Johnson* v. *Merithew*, 80 Me. 111. Neither statement seems accurate, though the result reached is sound.

The Supreme Court of the United States has recently arrived at an opposite and original conclusion. A will devised the whole property of the testatrix to her only son, but "in the event of my becoming the survivor . . . of my son" then to a charitable Home. The mother and the son died in a shipwreck; and the property is claimed by the Home, the mother's next of kin, and the son's personal representative. The Court gave the property to the first on the ground that the will showed an intention that the Home should take if the son did not. *The Young, etc., Home* v. *French*, 23 Sup. Ct. Rep. 184. This is in reality interpreting the above words to mean that "unless my son survives the property shall go to the Home" — a dangerous twisting of the actual provisions of the will. It seems that here the mother's next of kin should have prevailed, as neither of the other claimants could prove the survivorship necessary to his case.

When the contest arises under an insurance policy, the same principles govern. He who has a *prima facie* right to the proceeds of the policy necessarily wins. The courts, however, differ as to who has this right. In Missouri if the insured cannot alter the policy the beneficiary's interest is considered as vested, and his representative prevails; if the policy can be altered, the representative of the insured wins. *U. S. Casualty Co.* v. *Kacer*, 69 S. W. Rep. 370; *Supreme Council* v. *Kacer*, *ibid.* 671. The real question should be not whether the policy is revocable or not, but whether the condition that the beneficiary should survive the insured is in form precedent or subsequent. If it is the former, his representative must bring forward evidence of actual survivorship; if the latter, he need not. In theory this distinction is evidently sound. The cases are in conflict. *Fuller* v. *Linzee*, 135 Mass. 468; *Cowman* v. *Rogers*, 73 Md. 403.

RECENT CASES.

AGENCY — RECOVERY OF PAYMENT INDUCED BY FRAUD OF AGENT — C. O. D. COLLECTION. — While goods consigned to the plaintiff C. O. D. were in the custom house, the defendant company collected the charges, knowing that the goods were so damaged that, had the plaintiff known their condition, he would not have made the payment. Before demand by the plaintiff, the money had been paid to the consignor. *Held*, that the defendant is liable for money had and received. *Hardy* v. *American Exp. Co.*, 65 N. E. Rep. 375 (Mass.).

The case brings out clearly the true nature of the undertaking of a carrier to deliver goods consigned C. O. D. Being no part of his duty as a carrier, it is the result of a special contract, express or implied, by which he becomes the agent of the consignor for the collection of his charges. *Cox* v. *Columbus & W. R. R. Co.*, 91 Ala. 392. In this relationship the carrier is consequently subject to the ordinary rules of agency. Where there was no fraud by the carrier, but by the consignor, a recovery was allowed because the money was still in the carrier's hands. *Herrick* v. *Gallagher*, 60 Barb. (N. Y.) 566. Although in deciding that where the carrier is fraudulent, he is personally liable, the principal case goes a step forward, it seems to be entirely in accord with recognized principles of agency. *Martin* v. *Morgan*, 3 Moore 635; *Snowdon* v. *Davis*, 1 Taunt. 359.

BANKRUPTCY — ACT OF BANKRUPTCY — PROCURING APPOINTMENT OF RECEIVER. — *Held*, that obtaining the appointment of a receiver in a state court by an insolvent partnership is not an act of bankruptcy. *Re Burrell, Ex parte Varick Bank*,